

Supreme Court Issues  
Cases Not Yet Set & September Term 2021  
November 5, 2021

- Administrative Law—Hearing—Parties—Statutory Entitlement—Licensees.
- Bail—Bail Jumping—Elements—Knowing Failure to Appear “As Required”—Knowledge of Specific Date of Required Appearance—Jury Instructions—To-Convict Instruction—Adequacy.
- Civil Procedure—Identity of Parties—Use of Pseudonyms—Validity.
- Constitutional Law—Contracts—Due Process—Statutory Amendment—Retroactive Application—Effect on Vested Interests.
- \*Contracts—Limitation of Actions—Contract-Based Limitation—Substantive Unconscionability—Invocation of Limitation Period—Equitable Estoppel—Contractor’s Assurances.
- Criminal—Trial—Jury—Voir Dire—Juror Misconduct—Misleading Answers—Remedy—Disqualification—Mistrial.
- Criminal Law—Attempted Child Rape—Affirmative Defenses—Entrapment—Instruction—Entitlement—Defendant’s Burden—Quantum of Supporting Evidence.
- Criminal Law—Attempted Child Rape—Evidence—Entrapment—Lack of Predisposition—Absence of Prior Child Sex Crime Convictions—Admissibility.
- Criminal Law—Automobiles—Driving Under the Influence—Marijuana—Proof—Per Se Violation—Blood THC Concentration—Police Power—Vagueness.
- Criminal Law—Bail Jumping—Trial—Evidence—Sufficiency—Knowledge of Date of Required Appearance.
- Criminal Law—Burglary—Trafficking in Stolen Property—Evidence—Prior Acts—Interview Related to Prior Burglary—Admissibility.
- Criminal Law—Crimes—Animal Cruelty—Domestic Violence—Applicability.
- \*Criminal Law—Crimes—Elements—Essential Element—Determination—What Constitutes—Robbery—Use of Force or Fear to Obtain or Retain Property.
- \*Criminal Law—Evidence—Identification—Photographs—Photographic Montage—Suggestiveness—Minor Differences—Tattoos on Defendant.
- Criminal Law—Evidence—Search and Seizure—Search Warrant for Cell Phone Records—Validity—Probable Cause—Nexus to Charged Offenses.
- Criminal Law—Felony Indecent Exposure—Elements—Predicate Prior Conviction—Deferred Sentence—Dismissal—Effect.
- Criminal Law—First Degree Murder—Juvenile Offender—De Facto Life Sentence—Cruel Punishment.
- Criminal Law—Guilty Plea—Whether Knowing, Intelligent, and Voluntary—Ascertainment by Court—Informing Accused of Elements of Offense—Adequacy.

- \*Criminal Law—Homicide—Attempted First Degree Murder—Charging Document—Sufficiency—Essential Elements—Premeditation.
- Criminal Law—Homicide—Self-Defense—Imminence or Immediacy of Danger—Reasonableness of Belief or Apprehension—Evidence—Victim Toxicology Report—Exclusion—Right to Present Defense.
- Criminal Law—Juvenile Offenders—Collection of Biological Samples—DNA Analysis—Deferred Felony Disposition—Statutory Requirement.
- Criminal Law—Obstruction of Justice—Obstructing Law Enforcement Officer—Home Entry—Willful Refusal to Allow Entry—Community Caretaking Function—Validity.
- Criminal Law—Punishment—Sentence—Exceptional Sentence—Below Standard Range—Mitigating Circumstances—Minor Violation—Validity.
- Criminal Law—Punishment—Sentence—Indeterminate Sentence Predating SHB 1457—Setting of Minimum Sentence Under SHB 1457—Validity—Ex Post Facto Law.
- Criminal Law—Punishment—Sentence—Juvenile Offenders—*Houston-Sconiers* Case—Actual and Substantial Prejudice.
- Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller-Fix*—Indeterminate Sentence Review Board—Petition for Early Release—Factors.
- Criminal Law—Punishment—Sentence—Offender Score—Criminal History—Convictions for Possession of a Controlled Substance—*Blake* Decision—Effect.
- \*Criminal Law—Punishment—Sentence—Young Adult Offenders—*Monschke* Case—Personal Restraint—Petition—Time Limit—Exemptions—Change in Law.
- \*Criminal Law—Right to Present a Defense—Right to Cross-examine Police Witnesses—Officer Statements—Fifth Amendment Prohibition Against Self-Incrimination—Statements Made Under Threat of Termination.
- \*Criminal Law—Search and Seizure—Seizure—Request for Identification—Suspicion of Criminal Activity—Standard for Seizure—Reasonable Person—Race.
- Criminal Law—Sexual Offenses—Punishment—Sentence—Community Custody—Conditions—Reporting Dating Relationship—Validity—Vagueness.
- Criminal Law—Trial—Misconduct of Prosecutor—Arguments to Jury—False Choice—Telling Jury to Decide Whether Witnesses Lied.
- \*Criminal Law—Trial—Misconduct of Prosecutor—Voor Dire—Questioning of Prospective Jurors—Discussion of Illegal Immigration—Introduction of Racial Stereotypes—Fear of Undocumented Immigrants Committing Crimes.
- Criminal Law—Trial—Time of Trial—Objection—Timeliness.
- Criminal Law—Trial—Time of Trial—Waiver of Speedy Trial—Timely Assertion of Right—Defendant's Responsibility.
- Death—Wrongful Death—Statutory Beneficiaries—Second Tier Beneficiaries—Statutory Amendment—Retroactivity.

- Declaratory Judgment—Federal Enabling Act—State Constitution—Public Lands—Management Duty—Scope.
- Declaratory Judgment and Injunctive Relief—Motion to Dismiss—Municipal Ordinance—Food Delivery Drivers—Hazard Pay—Validity—State Tax Law—Constitutional Principles—Police Powers—Takings—Impairment of Contracts—Equal Protection—Privileges and Immunities—Civil Rights.
- Elections—Fair Campaign Practices—Disclosure Requirements—Violation—Fines—Treble Damages—Excessiveness.
- Environment—State Environmental Policy Act—Environmental Assessment—Conversion of Fish Farming Operation from One Species to another—Consideration of “No Action” Alternative—Necessity.
- Indians—Infants—Dependent Children—Interim Shelter Care Proceeding—Emergency Placement—Continued Out-of-Home Placement—Imminent Physical Danger or Harm.
- Indians—Infants—Dependent Children—Shelter Care Proceeding—Child Custody Proceeding—Efforts and Compliance by Government or Agency—“Active Efforts” Requirement—Applicability.
- \*Insurance—Life Insurance—Insurer Cause of Action—Validity of Policy—Fraud by Insured—Lack of Capacity to Enter Into Policy—Lack of Beneficiary Insurable Interest in Insured’s Life—Limitation of Action—Statutory Two-Year Limit to Contest Life Insurance Policy—Applicability.
- Juveniles—Dependent Child—Shelter Care Proceeding—Emergency Placement—Continued Out-of-Home Placement—“Reasonable Efforts” Requirement—Applicability.
- Juveniles—Parental Relationship—Dependency—Interlocutory Decision—Review—Probable Error—Alteration of Status Quo—Intervention—Permissive Intervention—Former Spouse—Validity.
- Juveniles—Parental Relationship—Dependency—Placement—Child’s Preference—Relatives—Denial—Validity.
- \*Juveniles—Parental Relationship—Termination—Evidence—Hearsay—Business Records—Nontestifying Witness—Notes, Evaluations, and Reports.
- Labor and Employment—Labor Strike—National Labor Relations Act—Tort Claims—Property Destruction—Federal Preemption.
- Labor and Employment—Labor Strike—Tort Claims—Fraudulent Representation—Negligent Representation—Statement of Existing Fact—Intentional Interference with a Business Contract—Causation.
- Law Against Discrimination—Real Property Instruments—Discriminatory Provisions—Declaratory Action to Remove—Physical Removal From Instrument—Necessity.
- Limitations of Actions—Tolling—Equitable Grounds—What Constitutes.
- Mandamus—Public Official—Duty to Act—Adequate Remedy at Law.
- Mandamus—Public Official—Duty to Act—Standing—Beneficial Interest.
- \*Marriage and Cohabitation—Transmutation of Separate Property into Community Property—Purchases—Joint Title—Presumption of Gift—Rebuttal—Degree of Proof—Extrinsic Evidence—Admissibility—Deeds.

- Medical Treatment—Malpractice—Action—Notice of Claim—Statutory Requirement—Claims Against State or State Agency—Right of Action—Validity—Separation of Powers.
- Municipal Corporations—Weapons—Firearms—Power to Regulate—State Preemption—Storage and Access Ordinances—Declaratory Judgment—Justiciable Controversy—Actual Dispute—Speculative Circumstance.
- Open Government—Public Disclosure—Exemptions—Other Statutory Exemptions—Personal Information—In-Home Caregivers—Retroactivity.
- Personal Injury—Action—Notice of Claim—Statutory Requirement—Claims Against Municipal Agency—Agency Employee—Validity—Separation of Powers.
- Personal Injury—Parks and Recreation—Statutory Immunity—Elements—Latent Condition—Summary Judgment.
- Personal Restraint—Grounds—Unanimity Jury Instruction—Necessity.
- Personal Restraint—Grounds—Withholding of Exculpatory Evidence—Witness’s Jail Behavior and Mental Health Issues—Prejudice—Standard.
- \*Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure to Consider Mitigating Factors Relating to Youth—Alternative Remedy—Petition for Early Release Under RCW 9.94A.730—Current Eligibility—Adequacy.
- \*Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure of Court to Consider Mitigating Factors Relating to Youth or to Understand Sentencing Discretion—Actual and Substantial Prejudice.
- \*Personal Restraint—Petition—Time Limit—Newly Discovered Evidence—Young Adult Offenders—Sentencing—Youth Brain Development Science.
- \*Personal Restraint—Petition—Time Limit—Newly Discovered Evidence—Young Adult Offenders—Sentencing—Youth Brain Development Science.
- Products Liability—Manufacturer—Duty to Warn—Medical Product—Prescription Only—Direct to Consumer Marketing—Learned Intermediary Doctrine—Applicability.
- Public Records—Law Enforcement Agency—Officer Internal Investigation—Closed Investigation—Disclosure of Identifying Records—Necessity.
- Right to Counsel—Effective Assistance of Counsel—Conflict of Interest—Failure to Move to Suppress—Failure to Make Legal Argument—Negative Comment on Defendant’s Pro Se Motion to Suppress.
- Searches and Seizures—Open View—Immediate Recognition—Necessity—“Virtual Certainty.”
- Statutes—Elections—Counties—Ballot Drop Boxes—State Reimbursement—Unfunded Mandate—Revision—Amendment by Reference—Prohibition.
- \*Taxation—Property Tax—Refund Action—Venue—Statutes—County In Which Tax Was Collected—Superior Court of Nearest Judicial Districts.

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## Cases Not Yet Set

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### **Administrative Law—Hearing—Parties—Statutory Entitlement—Licensees**

Whether members of a trade association for home, automobile, and business insurers qualify as “licensees” entitled to a hearing before the Office of the Administrative Hearings under [RCW 48.04.010\(5\)](#) in a challenge to a directive of the Washington Insurance Commissioner.

No. 100095-2, *Am. Prop. Cas. Ins. Ass’n* (petitioner) v. *Mike Kreidler, Ins. Comm’r* (respondent). (See also:.) [Mandamus—Public Official—Duty to Act—Standing—Beneficial Interest](#); [Mandamus—Public Official—Duty to Act—Adequate Remedy at Law](#))

[Top](#)

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### **\*Contracts—Limitation of Actions—Contract-Based Limitation—Substantive Unconscionability—Invocation of Limitation Period—Equitable Estoppel—Contractor’s Assurances**

Whether in this action for breach of a construction contract, a contractual clause establishing a one-year statute of limitations for any action involving latent defects is substantively unconscionable, and whether equitable estoppel principles bar application of the contractual limitation period based on the contractor’s assurances.

No. *Tadych, et ano.*, (appellants) v. *Noble Ridge Construction Inc., et al.*, (respondent).

[Unpublished.](#)

[Top](#)

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**Criminal—Trial—Jury—Voir Dire—Juror Misconduct—Misleading Answers—Remedy—Disqualification—Mistrial**

Whether in this prosecution for driving-related crimes, the accused had a right to disqualify a juror or obtain a mistrial because the juror failed to disclose during voir dire that her husband had recently been in an accident with an unlicensed driver.

No. 99850-7, [State \(respondent\) v. Lupastean \(petitioner\)](#).

[Unpublished.](#)

[Top](#)

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**Criminal Law—Automobiles—Driving Under the Influence—Marijuana—Proof—Per Se Violation—Blood THC Concentration—Police Power—Vagueness.**

Whether the per se marijuana driving under the influence (DUI) statute, [RCW 46.61.502\(1\)\(b\)](#), under which a person is guilty of DUI if the person has a blood THC concentration of 5 ng/mL or higher within two hours of driving, is invalid as an unconstitutional exercise of the State's police power or because the statute is vague.

No. 98896-0, *State (respondent) v. Fraser* (petitioner).

[Top](#)

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**\*Criminal Law—Crimes—Elements—Essential Element—Determination—What Constitutes—Robbery—Use of Force or Fear to Obtain or Retain Property**

Whether the charging document in this first degree robbery prosecution was deficient in not including the portion of the statutory definition of robbery stating that the defendant must have used force or fear to obtain or retain possession of the property taken or to prevent or overcome resistance to the taking.

No. 100038-3, *State (respondent) v. Derri a/k/a Stites* (petitioner). (See also: [Criminal Law—Evidence—Identification—Photographs—Photographic Montage—Suggestiveness—Minor Differences—Tattoos on Defendant](#)).

[17 Wn. App. 2d 376 \(2021\).](#)

[Top](#)

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**\*Criminal Law—Evidence—Identification—Photographs—Photographic Montage—Suggestiveness—Minor Differences—Tattoos on Defendant**

Whether in this first degree robbery prosecution, a photographic montage identification procedure was impermissibly suggestive because the defendant was the only person in the montage who had neck tattoos.

No. 100038-3, *State (respondent) v. Derri a/k/a Stites* (petitioner). (See also: [Criminal Law—Crimes—Elements—Essential Element—Determination—What Constitutes—Robbery—Use of Force or Fear to Obtain or Retain Property](#)).

[17 Wn. App. 2d 376 \(2021\)](#).

[Top](#)

---

**Criminal Law—First Degree Murder—Juvenile Offender—De Facto Life Sentence—Cruel Punishment**

Whether a prison sentence of 736 months (61.3 years) imposed on an offender for two counts of first degree murder committed when he was 17 constitutes cruel punishment in violation of article I, section 14 of the Washington Constitution.

No. 97890-5, *State (respondent) v. Anderson* (petitioner).

[Top](#)

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**\*Criminal Law—Homicide—Attempted First Degree Murder—Charging Document—Sufficiency—Essential Elements—Premeditation**

Whether in this prosecution for attempted first degree murder, the charging document was constitutionally deficient in failing to allege that the defendant acted with premeditated intent to kill as an essential element of the crime.

100029-4, *State (petitioner) v. Canela* (respondent).

[Unpublished](#).

[Top](#)

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**Criminal Law—Obstruction of Justice—Obstructing Law Enforcement Officer—Home Entry—Willful Refusal to Allow Entry—Community Caretaking Function—Validity**

Whether the State validly prosecuted a defendant for obstruction of justice when the defendant refused to open his residence to police seeking to make a warrantless entry based on a report of domestic violence.

No. 98622-3, *State* (respondent) v. *Jenkins* (petitioner).

[Top](#)

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**Criminal Law—Punishment—Sentence—Exceptional Sentence—Below Standard Range—Mitigating Circumstances—Minor Violation—Validity**

Whether in this prosecution for second degree robbery, the defendant was entitled to have the trial court consider imposing an exceptional sentence below the standard sentencing range on the basis the offense at issue was minor compared to most second degree robberies.

No. 99865-5, *State* (respondent) v. *Thomason* (petitioner).

[Unpublished.](#)

[Top](#)

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**\*Criminal Law—Punishment—Sentence—Young Adult Offenders—*Monschke* Case—Personal Restraint—Petition—Time Limit—Exemptions—Change in Law**

Whether the supreme court's decision in [In re Personal Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276 \(2021\)](#), holding that the sentencing discretion applicable to juvenile offenders tried in adult court also applies to 18-to-20-year-old offenders sentenced to life imprisonment without release, extends to these young adult offenders (18 and 21 years old) who received long sentences (310 months and 767 months), and if so, whether these petitions are exempt from the one-year time limit on collateral review.

No. 98031-4, *In re Pers. Restraint of Rivas* (petitioner). (See also: [Personal Restraint—Petition—Time Limit—Newly Discovered Evidence—Young Adult Offenders—Sentencing—Youth Brain Development Science](#)).

Consolidated with No. 98340-2, *In re Pers. Restraint of Davis* (petitioner).

[Top](#)

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**\*Criminal Law—Right to Present a Defense—Right to Cross-examine Police Witnesses—Officer Statements—Fifth Amendment Prohibition Against Self-Incrimination—Statements Made Under Threat of Termination**

Whether in this criminal prosecution for third degree assault of a law enforcement officer arising from a confrontation between the defendant and numerous police officers, the trial court violated the defendant's right to present a defense by denying him the opportunity to cross-examine police witnesses about the circumstances of the statements they had made about the incident under *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967).

No. 99959-7, *State (respondent) v. Zamora* (petitioner). (See also: [Criminal Law—Trial—Misconduct of Prosecutor—Voir Dire—Questioning of Prospective Jurors—Discussion of Illegal Immigration—Introduction of Racial Stereotypes—Fear of Undocumented Immigrants Committing Crimes](#)).

Unpublished.

[Top](#)

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**\*Criminal Law—Search and Seizure—Seizure—Request for Identification—Suspicion of Criminal Activity—Standard for Seizure—Reasonable Person—Race**

Whether in this criminal prosecution in which the defendant was held to have not been “seized” for constitutional purposes when a police officer approached him in his parked car and asked him to identify himself because there were reports of stolen vehicles in the area and the defendant could not answer who owned the vehicle, the traditional “reasonable person” and “totality of the circumstances” standard for whether a seizure occurred should be modified to take into account the perspective of a reasonable person of color.

No. 99730-6, *State (respondent) v. Sum (petitioner)*.

[Unpublished.](#)

[Top](#)

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**Criminal Law—Trial—Misconduct of Prosecutor—Arguments to Jury—False Choice—Telling Jury to Decide Whether Witnesses Lied**

Whether in this prosecution for sex offenses committed against a child, the prosecutor committed misconduct in arguing that the jury had to decide whether the complaining witness or the defense witnesses were lying.

No. 99396-3, *State (petitioner) v. Crossguns (respondent/cross-petitioner)*. (*See also*: [Criminal Law—Sex Offenses—Evidence—Prior Acts—Admissibility—Permissible Purpose—Lustful Disposition Toward Victim—Propriety](#)).

[Unpublished.](#)

[Top](#)

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**\*Criminal Law—Trial—Misconduct of Prosecutor—Voir Dire—Questioning of Prospective Jurors—Discussion of Illegal Immigration—Introduction of Racial Stereotypes—Fear of Undocumented Immigrants Committing Crimes**

Whether in this criminal prosecution for third degree assault of a law enforcement officer, the prosecutor, during jury selection, committed reversible misconduct and violated the defendant's right to an impartial jury by introducing issues of racial stereotypes, illegal immigration, and fear of undocumented immigrants committing crimes against American citizens.

No. 99959-7, *State* (respondent) *v. Zamora* (petitioner). (See also: [Criminal Law—Right to Present a Defense—Right to Cross-examine Police Witnesses—Officer Statements—Fifth Amendment Prohibition Against Self-Incrimination—Statements Made Under Threat of Termination](#)).

[Unpublished.](#)

[Top](#)

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**Declaratory Judgment and Injunctive Relief—Motion to Dismiss—Municipal Ordinance—Food Delivery Drivers—Hazard Pay—Validity—State Tax Law—Constitutional Principles—Police Powers—Takings—Impairment of Contracts—Equal Protection—Privileges and Immunities—Civil Rights**

Whether for purposes of deciding a motion to dismiss an action for declaratory and injunctive relief for failure to state a claim under [CR 12\(b\)\(6\)](#), plaintiffs made cognizable claims that Seattle City Ordinance No. 126094, which requires that food delivery drivers be compensated with hazard pay for deliveries made within the city of Seattle while the city's COVID-19 public health emergency is still in effect, (1) constitutes imposition of a tax, fee, or assessment on groceries in violation of [RCW 82.84.040\(1\)](#); (2) exceeds the city's police powers; (3) effects an unconstitutional taking of property without compensation; (4) impairs contractual obligations in violation of the United States Constitution and Washington Constitution; (5) violates equal protection principles under the United States Constitution; (6) violates the prohibition against privileges or immunities under the Washington Constitution; and (7) violates a plaintiff's civil rights under 42 U.S.C. § 1983.

No. 99771-3, *Wash. Food Indus. Ass'n., et al.* (respondents/cross-petitioners) *v. City of Seattle* (petitioner/cross-respondent).

[Top](#)

---

## **Indians—Infants—Dependent Children—Interim Shelter Care Proceeding—Emergency Placement—Continued Out-of-Home Placement—Imminent Physical Danger or Harm**

Whether under the Indian Child Welfare Act and the Washington Indian Child Welfare Act, the superior court is required to make a finding on the record that emergency placement is necessary to prevent imminent physical danger or harm to the child before ordering continued out-of-home placement at an interim shelter care hearing.

No. 99481-1, *In re the Welfare of J.M.W.* (petitioner). (See also: [Indians—Infants—Dependent Children—Shelter Care Proceeding—Child Custody Proceeding—Efforts and Compliance by Government or Agency—“Active Efforts” Requirement—Applicability](#)).

[Top](#)

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## **Indians—Infants—Dependent Children—Shelter Care Proceeding—Child Custody Proceeding—Efforts and Compliance by Government or Agency—“Active Efforts” Requirement—Applicability**

Whether a shelter care proceeding is a “child custody proceeding” under the Indian Child Welfare Act and the Washington Indian Child Welfare Act, requiring the State to demonstrate that it made active efforts to provide services to prevent the breakup of the Native family.

No. 99481-1, *In re the Welfare of J.M.W.* (petitioner). (See also: [Indians—Infants—Dependent Children—Interim Shelter Care Proceeding—Emergency Placement—Continued Out-of-Home Placement—Imminent Physical Danger or Harm](#))

[Top](#)

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**\*Insurance—Life Insurance—Insurer Cause of Action—Validity of Policy—Fraud by Insured—Lack of Capacity to Enter Into Policy—Lack of Beneficiary Insurable Interest in Insured’s Life—Limitation of Action—Statutory Two-Year Limit to Contest Life Insurance Policy—Applicability**

Whether in this suit by a life insurer challenging the validity of a policy, a statute providing that a life insurance policy may not be contested, except for nonpayment of premiums, after it has been in force for two years, *see* [RCW 48.24.120](#), is inapplicable when the insurer claimed that the insured committed fraud, that the insured lacked capacity to enter into the contract, or that the named beneficiary lacked an insurable interest in the life of the insured.

No. 100314-5, *New York Life Ins. Co.* (plaintiff) *v.* *Mitchell* (defendant).

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[Top](#)

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**Juveniles—Dependent Child—Shelter Care Proceeding—Emergency Placement—Continued Out-of-Home Placement—“Reasonable Efforts” Requirement—Applicability**

Whether in this emergency shelter care proceeding, the Department of Children, Youth, and Families was excused from making reasonable efforts to place a child with his biological father before placing the child in an out-of-home placement.

No. 99792-6, *In re the Dependency of L.C.S.* (petitioner).

Unpublished.

[Top](#)

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**Juveniles—Parental Relationship—Dependency—Interlocutory Decision—Review—Probable Error—Alteration of Status Quo—Intervention—Permissive Intervention—Former Spouse—Validity**

Whether in this dependency proceeding the superior court committed obvious error rendering further proceedings useless or probable error altering the status quo within the meaning of [RAP 2.3\(b\)\(2\)](#) and/or [13.5\(b\)\(2\)](#) by permitting the mother's former spouse to intervene in the proceeding as a de facto parent for her child without considering the potential conflict between the mother and her former spouse.

No. 100008-1, *In the Matter of the Welfare of N.G.* (petitioner).

[Top](#)

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**\*Juveniles—Parental Relationship—Termination—Evidence—Hearsay—Business Records—Nontestifying Witness—Notes, Evaluations, and Reports**

Whether in this action to terminate parental rights, a nontestifying witness's report that the father had attempted to submit a fake urine sample for a drug test was properly admitted under the business records hearsay exception.

No. 100144-4, *In re the Welfare of M.D.*

[Top](#)

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## **Labor and Employment—Labor Strike—Tort Claims—Fraudulent Representation—Negligent Representation—Statement of Existing Fact—Intentional Interference with a Business Contract—Causation**

Whether in this tort action by a concrete company against a labor union based in part on the failure of concrete truck drivers to respond to a job dispatch immediately after a labor strike, a union representative's statement that the "drivers have been instructed to respond to dispatch" was a statement of existing fact so as to support claims for fraudulent and negligent misrepresentation, and whether the company failed to establish that the statement caused the losses associated with the cancellation of a project so as to establish its claim for intentional interference with a business contract.

No. 99139-0, *Glacier Nw., Inc. (respondent) v. Int'l Brotherhood of Teamsters Local Union No. 174 (petitioner)*. (See also: [Labor and Employment—Labor Strike—National Labor Relations Act—Tort Claims—Property Destruction—Federal Preemption](#)).

[15 Wn. App. 2d 393 \(2020\)](#).

[Top](#)

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## **Limitations of Actions—Tolling—Equitable Grounds—What Constitutes**

What are the necessary and sufficient conditions under Washington law that a plaintiff in a civil action (other than a personal restraint petition or a habeas corpus petition) must establish to equitably toll the statute of limitations on their claim?

No. 100069-3, *Fowler (plaintiff) v. Guerin (defendant)*.

Certified from the U.S. District Court, Western District of Washington  
No. C15-5367 BHS

[Top](#)

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## **Mandamus—Public Official—Duty to Act—Adequate Remedy at Law**

Whether petitioner, a trade association for home, automobile, and business insurers seeking a writ of mandamus against the Washington Insurance Commissioner on behalf of its members, has a plain, speedy, and adequate remedy at law by way of further administrative proceedings followed by judicial review, precluding mandamus relief.

No. 100095-2, *Am. Prop. Cas. Ins. Ass'n* (petitioner) v. *Mike Kreidler, Ins. Comm'r* (respondent). (See also: [Mandamus—Public Official—Duty to Act—Standing—Beneficial Interest](#); [Administrative Law—Hearing—Parties—Statutory Entitlement—Licensees](#)).

[Top](#)

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## **Mandamus—Public Official—Duty to Act—Standing—Beneficial Interest**

Whether a trade association for home, automobile, and business insurers has standing to file an original action on behalf of its members seeking a writ of mandamus directing the Washington Insurance Commissioner to refer a pending administrative proceeding to the Office of Administrative Hearings.

No. 100095-2, *Am. Prop. Cas. Ins. Ass'n* (petitioner) v. *Mike Kreidler, Ins. Comm'r* (respondent). (See also: [Administrative Law—Hearing—Parties—Statutory Entitlement—Licensees](#); [Mandamus—Public Official—Duty to Act—Adequate Remedy at Law](#)).

[Top](#)

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**\*Marriage and Cohabitation—Transmutation of Separate Property into Community Property—Purchases—Joint Title—Presumption of Gift—Rebuttal—Degree of Proof—Extrinsic Evidence—Admissibility—Deeds**

Whether in this marriage dissolution case, real property acquired in the names of both spouses after marriage through the use of one spouse's separate property is subject to the joint title gift presumption, under which the property is presumed to be a gift to the community from the spouse supplying the separate funds, and if so, whether the parol evidence rule bars the use of extrinsic evidence to rebut the joint title gift presumption.

No. 100045-6, *In re the Marriage of Watannabe*.

[Unpublished.](#)

[Top](#)

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**Medical Treatment—Malpractice—Action—Notice of Claim—Statutory Requirement—Claims Against State or State Agency—Right of Action—Validity—Separation of Powers**

Whether in this civil suit for medical malpractice brought against a state agency, a statute that requires the plaintiff to obtain a certification of merit as a prerequisite to filing a lawsuit is constitutional.

No. 100103-7, *Martin* (plaintiff) v. *Dep't of Corr.* (defendant).

Certified from the U.S. Dist. Court, W. Dist of Wash.

[Top](#)

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**Municipal Corporations—Weapons—Firearms—Power to Regulate—State Preemption—Storage and Access Ordinances—Declaratory Judgment—Justiciable Controversy—Actual Dispute—Speculative Circumstance**

Whether, in this declaratory action to invalidate city firearms storage and access ordinances, the challenges to the access provisions are justiciable where the petitioners did not allege that they are likely to violate those provisions, and if so, whether the ordinances are preempted by the state firearms regulation statute, [RCW 9.41.290](#).

No. 99596-6, [City of Edmonds, et al. \(petitioner\) v. Bass, et al. \(respondents\)](#).

[16 Wn. App. 2d 488 \(2021\)](#).

[Top](#)

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**Personal Injury—Action—Notice of Claim—Statutory Requirement—Claims Against Municipal Agency—Agency Employee—Validity—Separation of Powers**

Whether in this personal injury action brought against a municipal agency employee in her individual capacity for a car accident that occurred in the performance of the employee's official duties, a statute that requires the plaintiff to file a notice of claim with the agency as a prerequisite to filing a lawsuit is constitutional.

No. 99823-0, [Hanson \(petitioner\) v. Carmona \(respondent\)](#).

[16 Wn. App. 2d 834 \(2021\)](#).

[Top](#)

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**\*Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure to Consider Mitigating Factors Relating to Youth—Alternative Remedy—Petition for Early Release Under RCW 9.94A.730—Current Eligibility—Adequacy**

Whether in relation to this personal restraint petition by an offender sentenced to a 50-year prison term when he was 17 years old, and who claims the sentencing court failed to consider the mitigating qualities of his youth, [RCW 9.94A.730](#), which permits juvenile offenders sentenced to lengthy terms to petition for parole after serving 20 years, is an adequate alternative remedy for this offender who is currently eligible to petition for parole, precluding relief by personal restraint petition. *See* [RAP 16.4\(d\)](#).

No. 98592-8, *In re Pers. Restraint of Grote* (petitioner). (*See also*: [Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure of Court to Consider Mitigating Factors Relating to Youth or to Understand Sentencing Discretion—Actual and Substantial Prejudice](#)).

[Top](#)

---

**\*Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure of Court to Consider Mitigating Factors Relating to Youth or to Understand Sentencing Discretion—Actual and Substantial Prejudice**

Whether a 17-year-old offender sentenced to 50 years imprisonment after pleading guilty to first degree murder has demonstrated actual and substantial prejudice entitling him to sentencing relief by personal restraint petition when there is no indication in the record that the sentencing court considered mitigating factors relating to youth or understood its sentencing discretion in relation to juveniles.

No. 98598-2, *In re Pers. Restraint of Grote* (petitioner). (*See also*: [Personal Restraint—Juvenile Offenders—Prison Sentence—Lengthy Sentence—Failure to Consider Mitigating Factors Relating to Youth—Alternative Remedy—Petition for Early Release Under RCW 9.94A.730—Current Eligibility—Adequacy](#)).

[Top](#)

---

**\*Personal Restraint—Petition—Time Limit—Newly Discovered Evidence—  
Young Adult Offenders—Sentencing—Youth Brain Development Science**

Whether recent science on youth brain development qualifies as “newly discovered evidence,” exempting from the one-year limit on collateral review this personal restraint petition challenging an exceptional sentence imposed on a young adult offender (19 years old).

No. 99748-9, *In re Pers. Restraint of Kennedy* (petitioner).

[16 Wn. App. 2d 423, 480 P.3d 498 \(2021\)](#).

[Top](#)

---

**\*Personal Restraint—Petition—Time Limit—Newly Discovered Evidence—  
Young Adult Offenders—Sentencing—Youth Brain Development Science**

Whether recent science on youth brain development qualifies as “newly discovered evidence,” exempting from the one-year limit on collateral review these personal restraint petitions challenging long sentences imposed on young adult offenders (18 and 21 years old).

No. 98031-4, *In re Pers. Restraint of Rivas* (petitioner). (See also: [Criminal Law—Punishment—Sentence—Young Adult Offenders—Monschke Case—Personal Restraint—Petition—Time Limit—Exemptions—Change in Law](#)).

Consolidated with No. 98340-2, *In re Pers. Restraint of Davis* (petitioner).

[Top](#)

---

**Products Liability—Manufacturer—Duty to Warn—Medical Product—Prescription Only—Direct to Consumer Marketing—Learned Intermediary Doctrine—Applicability**

Whether in this products liability action, a manufacturer that promotes a prescription drug through “direct-to-consumer” marketing is exempt from warning the consumer of the drug’s dangerous side effects under the “learned intermediary” doctrine.

No. 99956-2, *Dearinger, et al.* (plaintiffs) v. *Eli Lilly & Co.* (defendant).

Certified from the U.S. District Court, Western District of Washington.

[Top](#)

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**\*Taxation—Property Tax—Refund Action—Venue—Statutes—County in Which Tax Was Collected—Superior Court of Nearest Judicial Districts**

Whether [RCW 84.68.050](#), which states in part that an action for the recovery of taxes paid under protest “shall be brought in the superior court of the county wherein the tax was collected,” requires this property tax refund action involving property located in Lewis County to be brought in Lewis County, notwithstanding [RCW 36.01.050](#), which allows a party to file an action against a county in either the superior court of the defendant county or “in the superior court of either of the two nearest judicial districts.”

No. 100129-1, *Hardel Mut. Plywood Corp.* (petitioner) v. *Lewis County* (respondent).

[Top](#)

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**September Term 2021**  
**Cases Set for Oral Argument**

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**Bail—Bail Jumping—Elements—Knowing Failure to Appear “As Required”—Knowledge of Specific Date of Required Appearance—Jury Instructions—To-Convict Instruction—Adequacy**

Whether in this prosecution for bail jumping, a to-convict instruction stating that the jury had to find that the defendant failed to appear on a specific date after having been released “with knowledge of the requirement of a subsequent personal appearance before the court” adequately required the jury to find that the defendant had knowledge of the date he was required to appear, and if not, whether any error in the instruction was harmless beyond a reasonable doubt.

No. 99347-5, *State (petitioner) v. Bergstrom (respondent)*. (Oral argument: 9/23/21). (See also: [Criminal Law—Bail Jumping—Trial—Evidence—Sufficiency—Knowledge of Date of Required Appearance](#)).

[15 Wn. App. 2d 92 \(2020\)](#).

[Top](#)

---

**Civil Procedure—Identity of Parties—Use of Pseudonyms—Validity**

Whether city of Seattle police officers seeking to prevent disclosure of identifying information in internal investigation records under the Public Records Act may litigate under pseudonyms.

No. 99901-5, *Jane & John Does 1-6 (petitioners) v. Seattle Police Dep’t, et al. (respondents)*. (Oral argument: 11/9/21). (See also: [Public Records—Law Enforcement Agency—Officer Internal Investigation—Closed Investigation—Disclosure of Identifying Records—Necessity](#)).

[Top](#)

---



## **Constitutional Law—Contracts—Due Process—Statutory Amendment—Retroactive Application—Effect on Vested Interests**

Whether in this wrongful death action brought by second tier beneficiaries, the retroactive application of 2019 amendments to [RCW 4.20.020](#) would violate the defendant's vested substantive rights, in violation of the Washington Constitution's due process or contracts clauses.

No. 99724-1, *Kellogg* (plaintiff) v. *Nat'l Railroad Passenger Corp.* (defendant). (Oral argument 11/16/21) (See also: [Death—Wrongful Death—Statutory Beneficiaries—Second Tier Beneficiaries—Statutory Amendment—Retroactivity](#)).

Certified from the U.S. Dist. Court, Western Dist. of Washington.  
No. C20-5664 BHS

[Top](#)

---

## **Criminal Law—Attempted Child Rape—Affirmative Defenses—Entrapment—Instruction—Entitlement—Defendant's Burden—Quantum of Supporting Evidence**

Whether, in a prosecution for attempted child rape stemming from an undercover police operation, the defendant was entitled to a jury instruction on the defense of entrapment on the basis "some substantial evidence" established a prima facie case of entrapment without having to show the evidence was sufficient to establish the elements of entrapment by a preponderance of the evidence.

No. 99452-8, *State* (petitioner) v. *Arbogast* (respondent). (Oral argument: 9/21/21). (See also: [Criminal Law—Attempted Child Rape—Evidence—Entrapment—Lack of Predisposition—Absence of Prior Child Sex Crime Convictions—Admissibility](#)).

[15 Wn. App. 2d 851 \(2020\)](#).

[Top](#)

---

## **Criminal Law—Attempted Child Rape—Evidence—Entrapment—Lack of Predisposition—Absence of Prior Child Sex Crime Convictions—Admissibility**

Whether, in a prosecution for attempted child rape, the defendant was entitled to the admission of evidence that he had no prior child sex offense convictions for the purpose of proving the element of his entrapment defense that he lacked a predisposition to commit the charged offense.

No. 99452-8, *State (petitioner) v. Arbogast (respondent)*. (Oral argument: 9/21/21). (*See also*: [Criminal Law—Attempted Child Rape—Affirmative Defenses—Entrapment—Instruction—Entitlement—Defendant’s Burden—Quantum of Supporting Evidence](#)).

[15 Wn. App. 2d 851 \(2020\)](#).

[Top](#)

---

## **Criminal Law—Bail Jumping—Trial—Evidence—Sufficiency—Knowledge of Date of Required Appearance**

Whether in this prosecution for three counts of bail jumping, the evidence as to one count was sufficient to support a finding that the defendant knew he was to appear on a specified date.

No. 99347-5, *State (petitioner) v. Bergstrom (respondent)*. (Oral argument: 9/23/21). (*See also*: [Bail—Bail Jumping—Elements—Knowing Failure to Appear “As Required”—Knowledge of Specific Date of Required Appearance—Jury Instructions—To-Convict Instruction—Adequacy](#)).

[15 Wn. App. 2d 92 \(2020\)](#).

[Top](#)

---

## **Criminal Law—Crimes—Animal Cruelty—Domestic Violence—Applicability**

Whether in this criminal prosecution for animal cruelty, the State may apply a domestic violence designation under [RCW 10.99.010](#) for purposes of enhanced sentencing and the procurement of a victim protection order on the basis the defendant brutally kicked and killed a dog belonging to his household member.

No. 99581-8, [State \(petitioner\) v. Abdi-Issa \(respondent\)](#). (Oral argument 10/19/21).

[Unpublished.](#)

[Top](#)

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## **Criminal Law—Felony Indecent Exposure—Elements—Predicate Prior Conviction—Deferred Sentence—Dismissal—Effect**

Whether in this prosecution for felony indecent exposure, an element of which is the existence of a prior indecent exposure conviction, a prior conviction qualified as a predicate offense despite having been dismissed following the defendant's completion of a deferred sentence.

No. 99592-3, [State \(respondent\) v. Conaway \(petitioner\)](#). (Oral argument 11/18/21).

[Unpublished.](#)

[Top](#)

---

## **Criminal Law—Guilty Plea—Whether Knowing, Intelligent, and Voluntary—Ascertainment by Court—Informing Accused of Elements of Offense—Adequacy**

Whether in this prosecution for failure to register as a sex offender in which the defendant pleaded guilty, the trial court failed to adequately inform the defendant of the elements of the offense the State had to prove, making the guilty plea not knowing, intelligent, and voluntary.

No. 99310-6, [State \(respondent\) v. Snider \(petitioner\)](#). (Oral argument: 10/19/21).

[Unpublished.](#)

[Top](#)

---

**Criminal Law—Homicide—Self-Defense—Imminence or Immediacy of Danger—Reasonableness of Belief or Apprehension—Evidence—Victim Toxicology Report—Exclusion—Right to Present Defense**

Whether in this prosecution for second degree felony murder, the trial court violated the defendant’s right to present a defense under the standard of review articulated in [State v. Arndt](#), 194 Wn.2d 784, 797, 453 P.3d 696 (2019), by excluding the victim’s toxicology report, which the defendant intended to use in support of his claim of self-defense.

No. 99337-8, [State \(respondent\) v. Jennings \(petitioner\)](#). (Oral argument: 9/30/21). (See also: [Criminal Law—Punishment—Sentence—Offender Score—Criminal History—Convictions for Possession of a Controlled Substance—Blake Decision—Effect](#)).

[14 Wn. App. 2d 779 \(2020\)](#).

[Top](#)

---

**Criminal Law—Juvenile Offenders—Collection of Biological Samples—DNA Analysis—Deferred Felony Disposition—Statutory Requirement**

Whether [RCW 43.43.754\(l\)\(a\)](#), which provides that a biological sample must be collected for DNA identification analysis from every “adult or juvenile individual convicted of a felony,” requires collection from a juvenile who has received a deferred felony disposition.

No. 99374-2, [State \(respondent\) v. M.Y.G. \(petitioner\)](#). (Oral argument: 9/21/21).

consolidated with

No. 99379-3, [State \(respondent\) v. I.A.S. \(petitioner\)](#).

[15 Wn. App. 2d 641 \(2020\)](#).

[15 Wn. App. 2d 634 \(2020\)](#).

[Top](#)

---

**Criminal Law—Punishment—Sentence—Indeterminate Sentence Predating SHB 1457—Setting of Minimum Sentence Under SHB 1457—Validity—Ex Post Facto Law**

Whether SHB 1457, Laws of 1989, chapter 259, under which the Indeterminate Sentencing Review Board was required to set minimum terms consistent with the Sentencing Reform Act for offenders serving indeterminate sentences, violates constitutional ex post facto principles on its face or as applied to an offender who was eligible for parole in 20 years under his original sentence but received a minimum term of 60 years under SHB 1457.

No. 98917-6, *In re Pers. Restraint of Gallegos* (petitioner). (Oral argument: 10/28/21).

[Top](#)

---

**Criminal Law—Punishment—Sentence—Juvenile Offenders—*Houston-Sconiers* Case—Actual and Substantial Prejudice**

Whether two defendants who were convicted and sentenced while juveniles in the adult criminal justice system were actually and substantially prejudiced at sentencing in light of the supreme court's retroactively applicable decision in [State v. Houston-Sconiers](#), 188 Wn.2d 1, 391 P.3d 409 (2017), holding that in sentencing juveniles tried as adults the trial court has discretion to depart from the sentencing guidelines and mandatory sentence enhancements considering the mitigating circumstances of a defendant's youth.

No. 95217-5, *In re Pers. Restraint of Vincent* (petitioner). (Oral argument: 9/23/21).

Consolidated with:

No. 95439-9, *In re Pers. Restraint of Carter-Vincent* (petitioner).

[Top](#)

---

**Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller-Fix*—Indeterminate Sentence Review Board—Petition for Early Release—Factors**

Whether in this offender’s petition for early release pursuant to [RCW 9.94A.730](#) for crimes committed as a juvenile, the Indeterminate Sentence Review Board considered improper factors in denying release.

No. 98078-1, *In re Pers. Restraint of Dodge* (petitioner). (Oral argument: 9/23/21).

[Top](#)

---

**Criminal Law—Punishment—Sentence—Offender Score—Criminal History—Convictions for Possession of a Controlled Substance—*Blake* Decision—Effect**

Whether, in light of the court’s decision in *State v. Blake*, [197 Wn.2d 170](#), [481 P.3d 521 \(2021\)](#), where the court held unconstitutional Washington’s strict liability drug possession statute, the defendant in this case must be resentenced because his offender score included prior convictions for drug possession.

No. 99337-8, *State (respondent) v. Jennings* (petitioner). (Oral argument: 9/30/21). (See also: [Criminal Law—Homicide—Self-Defense—Imminence or Immediacy of Danger—Reasonableness of Belief or Apprehension—Evidence—Victim Toxicology Report—Exclusion—Right to Present Defense](#)).

[14 Wn. App. 2d 779 \(2020\)](#).

[Top](#)

---

**Criminal Law—Trial—Time of Trial—Objection—Timeliness**

Whether in a criminal trial a defendant is required to file a time-for-trial objection pursuant to [CrR 3.3\(d\)\(3\)](#) before the expiration of the time-for-trial period.

No. 99813-2, *State (cross petitioner & respondent) v. Walker* (respondent & petitioner). (Oral argument 11/18/21). (See also: [Criminal Law—Trial—Time of Trial—Waiver of Speedy Trial—Timely Assertion of Right—Defendant’s Responsibility](#)).

[Unpublished](#).

[Top](#)

---

## **Criminal Law—Trial—Time of Trial—Waiver of Speedy Trial—Timely Assertion of Right—Defendant’s Responsibility**

Whether in this criminal trial the defendant waives her right to object to a time for trial violation because defense counsel knew the trial date was set beyond the time limit of the court rules and failed to so advise the trial court.

No. 99813-2, *State* (cross petitioner & respondent) v. *Walker* (respondent & petitioner). (Oral argument 11/18/21). (See also: [Criminal Law—Trial—Time of Trial—Objection—Timeliness](#)).

[Unpublished.](#)

[Top](#)

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## **Death—Wrongful Death—Statutory Beneficiaries—Second Tier Beneficiaries—Statutory Amendment—Retroactivity**

Whether in this wrongful death action, a 2019 amendment to [RCW 4.20.020](#) applies retroactively to permit second tier beneficiaries to assert their own wrongful death claims when, before the amendment, they were ineligible to assert wrongful death claims both at the time of the decedent’s death and at the time the estate’s personal representative entered into a settlement.

No. 99724-1, *Kellogg* (plaintiff) v. *Nat’l Railroad Passenger Corp.* (defendant). (Oral argument 11/16/21). (See also: [Constitutional Law—Contracts—Due Process—Statutory Amendment—Retroactive Application—Effect on Vested Interests](#)).

Certified from the U.S. Dist. Court, Western Dist. of Washington.  
No. C20-5664 BHS

[Top](#)

---



## **Declaratory Judgment—Federal Enabling Act—State Constitution—Public Lands—Management Duty—Scope**

Whether in this declaratory judgment action brought under article XVI, section 1 of the Washington Constitution, which provides that public lands are held in trust for “all the people,” the Commissioner of Public Lands and the Washington State Department of Natural Resources have the constitutional authority and obligation to manage the state’s federally-granted lands in a manner that is consistent with the best interest of all Washington citizens or exclusively in the best economic interest of select institutional beneficiaries.

No. 99183-9, *Conservation Nw., et al.* (appellants) v. *Comm’r of Pub. Lands, et al.* (respondents). (Oral argument: 10/21/21).

[Top](#)

---

## **Elections—Fair Campaign Practices—Disclosure Requirements—Violation—Fines—Treble Damages—Excessiveness**

Whether an \$18 million fine, imposed in this case for intentional violation of Fair Campaign Practices Act funding disclosure provisions, is unlawful as an excessive fine under the Eighth and Fourteenth Amendments.

99407-2, *State v. Grocery Mfrs. Ass’n*. (Oral argument: 9/28/21).

[15 Wn. App. 2d 290, 475 P.3d 1062 \(2020\)](#).

[Top](#)

---

## **Environment—State Environmental Policy Act—Environmental Assessment—Conversion of Fish Farming Operation from One Species to another—Consideration of “No Action” Alternative—Necessity**

Whether in conducting an environmental review of a petition to farm Pacific steelhead in existing Puget Sound aquatic farming nets previously used to farm Atlantic salmon, the Department of Fish and Wildlife was required to consider a “no action” alternative under [RCW 43.21C.030\(2\)\(e\)](#) of the State Environmental Policy Act.

No. 99263-1, *Wild Fish Conservancy, et al.* (petitioner) v. *Dep’t of Fish & Wildlife & Cooke Aquaculture Pacific, LLC*, (respondents). (Oral argument: 9/28/21).

[Top](#)

---

**Juveniles—Parental Relationship—Dependency—Placement—Child’s Preference—Relatives—Denial—Validity**

Whether in this dependency action involving a Black child, the Department of Children, Youth and Families and the trial court improperly disregarded the child’s wishes to be placed with his long-term relative caretakers.

No. 99301-7, *In re the Dependency of K.W.* (petitioner). (Oral argument: 9/28/21).

[Top](#)

---

**Labor and Employment—Labor Strike—National Labor Relations Act—Tort Claims—Property Destruction—Federal Preemption**

Whether the National Labor Relations Act preempts a concrete company’s tort claims against a labor union for common law conversion, intentional interference with business contracts, and civil conspiracy based on the alleged intentional destruction of concrete by union-represented drivers who left their concrete-mixing trucks filled with wet concrete at the beginning of a strike.

No. 99319-0, *Glacier Nw., Inc.* (respondent) *v. Int’l Brotherhood of Teamsters Local Union No. 174* (petitioner). (Oral argument 9/21/21). (*See also*: [Labor and Employment—Labor Strike—Tort Claims—Fraudulent Representation—Negligent Representation—Statement of Existing Fact—Intentional Interference with a Business Contract—Causation](#)).

15 Wn. App. 2d 393(2020).

[Top](#)

---

**Labor and Employment—Labor Strike—Tort Claims—Fraudulent Representation—Negligent Representation—Statement of Existing Fact—Intentional Interference with a Business Contract—Causation**

Whether in this tort action by a concrete company against a labor union based in part on the failure of concrete truck drivers to respond to a job dispatch immediately after a labor strike, a union representative’s statement that the “drivers have been instructed to respond to dispatch” was a statement of existing fact so as to support claims for fraudulent and negligent misrepresentation, and whether the company failed to establish that the statement caused the losses associated with the cancellation of a project so as to establish its claim for intentional interference with a business contract.

No. 99319-0, *Glacier Nw., Inc. (respondent) v. Int’l Brotherhood of Teamsters Local Union No. 174 (petitioner)*. (Oral argument 9/21/21). (See also: [Labor and Employment—Labor Strike—National Labor Relations Act—Tort Claims—Property Destruction—Federal Preemption](#)).

[15 Wn. App. 2d 393\(2020\)](#).

[Top](#)

---

**Law Against Discrimination—Real Property Instruments—Discriminatory Provisions—Declaratory Action to Remove—Physical Removal From Instrument—Necessity**

Whether [RCW 49.60.227](#) of Washington’s Law Against Discrimination, which authorizes courts to enter declaratory judgments “striking” unlawfully discriminatory provisions from real property instruments, requires a public records custodian in response to a judgment to physically remove the unlawful language from the instrument or whether it is sufficient for the court by order to declare the language void and stricken.

No. 99598-2, *May (petitioner) v. County of Spokane & Dalton (respondents)*. (Oral argument: 10/21/21).

[16 Wn. App. 2d 505 \(2021\)](#).

[Top](#)

---

## **Personal Injury—Parks and Recreation—Statutory Immunity—Elements—Latent Condition—Summary Judgment**

Whether in this action for personal injury arising from a bicyclist colliding with a recreational trail bollard, the county that owns and operates the trail system is entitled to dismissal of the suit based on recreational use immunity because the bollard is not a dangerous and latent condition as a matter of law on the basis it is a readily photographable safety feature, or whether there is a genuine issue of material fact as to whether it is a latent hazard because experts testified that the bollard was difficult to see at different times of day.

No. 99359-9, [Schwarz \(respondent\) v. King County \(petitioner\)](#). (Oral argument: 9/30/21).

[14 Wn. App. 2d 915 \(2020\)](#).

[Top](#)

---

## **Personal Restraint—Grounds—Unanimity Jury Instruction—Necessity**

Whether in this criminal prosecution for child assault ,the defendant was entitled to a jury instruction on unanimity because the evidence revealed multiple instances of assault, or whether this case involves alternative means of committing assault not requiring such an instruction.

No. 99403-0, *In re Pers. Restraint of Muamba* (petitioner). (Oral Argument: 10/28/21).  
(See also: [Personal Restraint—Grounds—Withholding of Exculpatory Evidence—Witness’s Jail Behavior and Mental Health Issues—Prejudice—Standard](#)).

[Unpublished](#).

[Top](#)

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## **Personal Restraint—Grounds—Withholding of Exculpatory Evidence—Witness’s Jail Behavior and Mental Health Issues—Prejudice—Standard**

Whether in this criminal prosecution for child assault, the State had an obligation to disclose a State witness’s jail behavior and mental health issues, and if so, whether the defendant can demonstrate prejudice from the State’s failure to disclose.

No. 99403-0, *In re Pers. Restraint of Mulamba* (petitioner). (Oral argument: 10/28/21).  
(See also: [Personal Restraint—Grounds—Unanimity Jury Instruction—Necessity](#)).

[Unpublished.](#)

[Top](#)

---

## **Public Records—Law Enforcement Agency—Officer Internal Investigation—Closed Investigation—Disclosure of Identifying Records—Necessity**

Whether identifying information in internal investigation records of city of Seattle police officers must be disclosed under the Public Records Act.

No. 99901-5, *Jane & John Does 1-6* (petitioners) v. *Seattle Police Dep’t et al.* (respondents). (Oral argument: 11/9/21). (See also: [Civil Procedure—Identity of Parties—Use of Pseudonyms—Validity](#)).

[Top](#)

---

**Right to Counsel—Effective Assistance of Counsel—Conflict of Interest—Failure to Move to Suppress—Failure to Make Legal Argument—Negative Comment on Defendant’s Pro Se Motion to Suppress**

Whether in this prosecution for residential burglary, defense counsel was ineffective in not moving to suppress the evidence seized in a warrantless search, and in stating on the record that the defendant’s pro se motion to suppress was not likely to succeed.

No. 99546-0, [State \(respondent\) v. Elwell \(petitioner\)](#). (Oral argument: 10/21/21).  
(*See also*: [Searches and Seizures—Open View—Immediate Recognition—Necessity—“Virtual Certainty”](#)).

[Unpublished.](#)

[Top](#)

---

**Searches and Seizures—Open View—Immediate Recognition—Necessity—“Virtual Certainty”**

Whether in this prosecution for residential burglary, a stolen videogame machine seized without a warrant was admissible under the open view doctrine where the arresting officers claimed to be “virtually certain” that a blanket-covered item that the defendant was pushing on a cart in open view was the stolen machine.

No. 99546-0, [State \(respondent\) v. Elwell \(petitioner\)](#). (Oral argument: 10/21/21).  
(*See also*: [Right to Counsel—Effective Assistance of Counsel—Conflict of Interest—Failure to Move to Suppress—Failure to Make Legal Argument—Negative Comment on Defendant’s Pro Se Motion to Suppress](#)).

[Unpublished.](#)

[Top](#)

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**Statutes—Elections—Counties—Ballot Drop Boxes—State Reimbursement—  
Unfunded Mandate—Revision—Amendment by Reference—Prohibition**

Whether in this declaratory action involving [RCW 29A.40.170\(2\)](#), which requires Washington counties to install, maintain, and operate a certain number of ballot drop boxes; [RCW 43.135.060](#), the “unfunded mandate” statute; [RCW 29A.04.410 through .430](#) and a recent related amendment concerning state reimbursement of election costs incurred by counties; and article II, section 37 of the Washington Constitution, which prohibits amending a statute by reference to its title; respondent counties are entitled to full reimbursement from the State for costs incurred in installing and maintaining the required election drop boxes.

No. 99230-4, *Wash. State Ass’n of Counties, et al.* (respondents) v. *State* (appellant).  
(Oral Argument 11/16/21).

[Top](#)

---